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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-247

HELEN FOLEY,

Petitioner,

vs.

STATE OF NEW JERSEY,

Respondent.

On Petition for Writ of Certiorari to the Superior Court of New Jersey Appellate Division

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Opinions Below

The orders of the Supreme Court of New Jersey, not yet reported, appear in petitioner's appendix, pp. 19 and 20. The opinion of the Superior Court of New Jersey, Appellate Division, not reported, appears in petitioner's appendix, p. 21.

Statutes and Rules Involved

N.J.S.A. 2A:10-1

The power of any court of this state to punish for contempt shall not be construed to extend to any case except the:

a. Misbehavior of any person in the actual presence of the court;

b. Misbehavior of any officer of the court in his official transactions; and

c. Disobedience or resistance by any court officer, or by any party, juror, witness or any person whatsoever to any lawful writ, process, judgment, order, or command of the court.

Nothing contained in this section shall be deemed to affect the inherent jurisdiction of the superior court to punish for contempt.

New Jersey Court Rule 1:10-1

Contempt in the actual presence of a judge may be adjudged summarily by the judge without notice or order to show cause. The order of contempt shall recite the facts and contain a certification by the judge that he saw or heard the conduct constituting the contempt.

New Jersey Court Rule 1:10-2

Every other summary proceeding to punish for contempt shall be on notice and instituted only by the court upon an order for arrest or an order to show cause specifying the acts or omissions alleged to have been contumacious. The proceeding shall be captioned "In the Matter of ———— Charged with Contempt of Court."

Statement of the Case

On January 14, 1976, petitioner received a parking ticket in Princeton, New Jersey. She returned the ticket to the court with an obscenity written on it. Upon receipt of this summons, Judge Philip S. Carchman of the Municipal Court in the Borough of Princeton ordered defendant to appear in court. A hearing was held on April 5, 1976, during which Judge Carchman informed petitioner that she had been ordered to appear in court because the obscenity she had written on the parking ticket was contemptuous of the court. Petitioner stated that she understood the charge against her and entered a plea of not guilty. The court advised petitioner that the contempt charge would be heard by another judge and that she would be notified as to the date and location of that proceeding at a later date.

In a written correspondence dated May 19, 1976, the Honorable George Y. Schoch, Assignment Judge of the Superior Court of New Jersey, informed petitioner that he would conduct a hearing on her contempt charge on June 16, 1976 in Trenton. In a letter dated May 21, 1976, petitioner advised Judge Schoch that she would not appear at this hearing.

At the June 16 hearing, unattended by petitioner, the parking ticket returned by petitioner was identified and entered into evidence. Across the face of the ticket the following words were written: "'Mutha Fuck A!', Fine me $50—, (I'm older and fatter than the long haired hippie!), H. Foley." The court found petitioner guilty of contempt of court.

A sentencing hearing was held by Judge Schoch on June 30, 1976. Petitioner was in attendance and was fined $25. Petitioner filed a Notice of Appeal to the Ap-

pellate Division of the Superior Court of New Jersey on July 30, 1976. On February 23, 1977, the Appellate Division affirmed petitioner's conviction. A petition for certification to the Appellate Division and an appeal from the decision of the Appellate Division were filed by petitioner with the Supreme Court of New Jersey on March 15, 1977. The Supreme Court denied the petition and dismissed the appeal on May 17, 1977. On August 12, 1977 petitioner filed with this Court a petition for writ of certiorari.

REASONS FOR DENYING CERTIORARI

POINT I

Petitioner was given sufficient notice of the contempt charge to satisfy the requirements of due process.

Petitioner contends that the notice she received apprising her that she had been charged with contempt of court and that a hearing on this charge had been scheduled was insufficient pursuant to the New Jersey Court Rules. This alleged insufficiency, she claims, violated her right to due process of law under the Fourteenth Amendment. Respondent submits that the notice given petitioner was in accordance with the New Jersey Court Rules and was clearly consistent with due process.

In contempt proceedings, due process of law requires that a defendant be advised of the charges against him and afforded ample opportunity to appear and be heard with regard to those charges. *Taylor* v. *Hayes,* 418 U.S. 488, 498 (1974); *Groppi* v. *Leslie,* 404 U.S. 496 (1972); *In re Oliver,* 333 U.S. 257 (1948); *Fisher* v. *Marubeni*

Cotton Corp., 526 F.2d 1338, 1342 (8 Cir. 1975); *Brotherhood of Locomotive Firemen and Enginemen* v. *Bangor & Aroostook R. Co.,* 380 F.2d 570, 581-582 *cert. den.* 389 U.S. 327 (1967). The notice provided in such cases must be sufficient to inform the defendant of the nature and particulars of the charge against him and to enable him to appear and be heard on that charge. *Blackmer* v. *United States,* 284 U.S. 421, 440 (1932); *Cooke* v. *United States,* 267 U.S. 517 (1924); *Yates* v. *United States,* 316 F. 2d 718 (12 Cir. 1963) *Cf. Mullane* v. *Central Hanover Bank & Trust Co.,* 339 U.S. 306, 314-315 (1950). See also *F.R.C.P.* 42(b).

The courts, however, have repeatedly emphasized that due process is concerned with the fundamental fairness of governmental action. *Mitchell* v. *W.T. Grant Co.,* 416 U.S. 600, 610 (1974); *Bolling* v. *Sharpe,* 347 U.S. 497 (1954); *Foster* v. *People of the State of Illinois,* 332 U.S. 134 (1947); *Inland Empire Council* v. *Millis,* 325 U.S. 697, 710 (1945). The Due Process Clause of the Fourteenth Amendment does not require or guarantee a particular procedural form in the state courts. *Hardware Dealers' Mutual Fund Ins. Co. of Wisconsin* v. *Glidden Co.,* 284 U.S. 151 (1931); *Wood* v. *Conneaut Lake Park, Inc.,* 258 F. Supp. 777, 779 (W.D. Pa. 1966), aff'd 386 F.2d 121 (3 Cir. 1967), *cert.* den. 391 U.S. 907 (1968). In determining the constitutional adequacy of notice in state proceedings, the federal courts look to the practical realities of the circumstances of each particular case to determine if the procedure utilized is sufficient. *Mitchell* v. *W.T. Grant, supra; Palmer* v. *Columbia Gas of Ohio,* 479 F.2d 153, 170 (6 Cir. 1973).

Respondent submits that the notice afforded petitioner in the instant case clearly satisfied the requirements of due process. Petitioner appeared at a Municipal Court hear-

ing after the return of her parking ticket, and was informed that she was being charged with contempt of court for the language she had written on the summons. She subsequently received a letter from a Superior Court judge apprising her again of the charge against her, and specifying the time and place of the hearing to be held on that charge. It is clear, furthermore, that petitioner received actual notice of this hearing, because she informed the court by letter that she would not appear at that proceeding.

Petitioner contends, nonetheless, that she was denied due process because the notice provided her did not comply with the applicable New Jersey Court Rules. R. 1:10-1 provides:

> Contempt in the actual presence of a judge may be adjudged summarily by the judge without notice or order to show cause. The order of contempt shall recite the facts and contain a certification by the judge that he saw or heard the conduct constituting the contempt.

R. 1:10-2 provides:

> Every other summary proceeding to punish for contempt shall be on notice and instituted only by the court upon an order for arrest or an order to show cause specifying the acts or omissions alleged to have been contumacious . . .

Defendant argues that her allegedly contemptuous conduct was not committed in the presence of the court, and therefore her contempt proceedings could only have been instituted by the court upon an order to show cause. The court below did not specify which of the above rules it proceeded under. The decisions of other New Jersey

Courts, however, clearly indicate that the procedure referred to in R. 1:10-2 was not required in the instant case.

Under R. 1:10-1 and the New Jersey contempt statute,* contempt committed in the "actual presence" of the court may be dealt with without an order to show cause. The New Jersey judiciary has consistently given this phrase a broad construction and has held that this language contemplates more than just contemptuous conduct engaged in while the judge is presiding in the courtroom. *McAllister* v. *McAllister,* 95 N.J. Super. 426, 434, 231 A.2d 394 (App. Div. 1967); *In re Jenkinson,* 93 N.J. Eq. 545, 546, 118 A. 240 (Ch. Div. 1922); *In re Merrill,* 88 N.J. Eq. 261, 275, 102 A. 400 (Prerog. Ct. 1917). In *State* v. *Gussman,* 34 N.J. Sup. 408, 172 A.2d 565 (App. Div. 1955), the defendant was convicted of contempt for writing and mailing a letter to the judge. The court stated that contempt in the "actual presence of the court" encompasses acts outside the courtroom, and it held that the mailing of this letter to the court was in the court's actual presence. *Gussman, supra* at 415, 417. The recent decision of *State* v. *Sax,* 139 N.J. Super. 157, 353 A.2d 113 (App. Div. 1976), is directly on point and dispositive of the instant case. In *Sax,* defendant was convicted of contempt for returning a parking ticket to the clerk of the court accompanied by a letter containing an obscenity. The court, in the initial paragraph of its opinion, stated that the contempt was properly prosecuted under R. 1:10-1. *Sax, supra* at 158. The municipal court had certified the language of the

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* N.J.S.A. 2A:10-1, which defines the substantive offense of contempt provides in part:

> The power of any court of this state to punish for contempt shall not be construed to extend to any case except the (a) Misbehavior of any person in the actual presence of the court . . .

letter, heard defendant and his attorney and then found him guilty of contempt. The *Sax* Court emphasized that an act of contempt may occur "in the presence of the court" even though the judge himself did not see or hear the contemptuous act at the instant it was committed by the defendant. *Sax, supra* at 160. It is thus clear that the court below, in notifying petitioner of the charge and the hearing in question, was not required to proceed in the manner claimed by petitioner.

Even assuming that petitioner's contempt proceedings should have been instituted by an order to show cause pursuant to R. 1:10-2, the procedure employed below did not deny her due process of law and would not warrant the granting of a petition for writ of certiorari. In *Van Sweringen* v. *Van Sweringen,* 22 N.J. 440, 444, 126 A.2d 334 (1956), the New Jersey Supreme Court stated that the crucial emphasis in contempt proceedings should be placed upon notice and a fair hearing. A court should examine whether the notice a defendant received of the contempt hearing adequately informed him of the charges. Rigid adherence to every procedural dictate of R. 1:10-2 is unnecessary as long as the spirit of that Rule has been satisfied. *Board of Education of Newark* v. *Newark Teachers Union,* 114 N.J. Super. 306, 317, 276 A.2d 175, (App. Div. 1971), certif. den. 58 N.J. 605 (1971), *cert. den.* 404 U.S. 950 (1971). The court in *Van Sweringen, supra,* ruled that minor irregularities in the preliminary procedural steps do not justify a reversal unless some substantial prejudice is suffered by a defendant. See *Van Sweringen* v. *Van Sweringen,* 34 N.J. Super. 394, 402, 112 A.3d 584 (App. Div. 1955), rev'd on other grounds 22 N.J. 446 (1956).

This Court has also expressly held that technical accuracy in the contempt procedure is not required. In

United States v. *United Mine Workers,* 330 U.S. 258 (1947) it was argued that the defendants were not properly notified that they had been charged with contempt in federal district court. The Supreme Court responded that the federal rule dealing with contempt "requires no such vigorous application, for it was designed to insure a realization by contemnors that a prosecution for criminal contempt is contemplated. Its purpose was sufficiently fulfilled here, for this failure to observe the rule in all respects has not resulted in substantial prejudice to the defendants." *Id.* at 297-298. See also *United States* v. *Handlin,* 476 F.2d 709, 712-713 (2 Cir. 1973); *Allen* v. *United States Fidelity and Guaranty Co.,* 342 F.2d 951, 956 (9 Cir. 1965).

Even if the notification in question had resulted in a clear violation of state law, a petition for writ of certiorari would not be warranted. As indicated above, the procedure utilized satisfied the constitutional requirement of due process. Once this has been established, the fact that the procedure may have violated state law, will not be considered by this Court. *Gryger* v. *Burke,* 334 U.S. 728, 731 (1948); *Patterson* v. *Colorado,* 205 U.S. 454 (1907).

Respondent submits that the procedure employed by the court below to notify petitioner of the charge against her was consistent with due process of law and the New Jersey Court Rules. Her petition for a writ of certiorari should therefore be denied.

POINT II

Petitioner's guilt of contempt of court was established beyond a reasonable doubt.

Petitioner argues that her guilt of contempt of court was not established at the proceeding below. Specifically she contends that it was never demonstrated that she possessed the requisite intent to commit the contempt in question. Respondent submits that petitioner's guilt was established beyond a reasonable doubt.

Contempt has been defined as:

> . . . a disobedience of the court by acting in opposition to its authority, justice and dignity. It comprehends any act which is calculated to or tends to embarrass, hinder, impede, frustrate, or obstruct the court in the administration of justice, or which is calculated to or has the effect of lessening its authority or its dignity; or which interferes with or prejudices parties during the course of litigation; or which otherwise tends to bring the authority and administration of the law into disrepute or disregard. In short, any conduct is contemptible which bespeaks of scorn or disdain for a court or its authority. *In re Callan,* 122 N.J. Super. 479, 494 (Ch. Div. 1973), aff'd 126 N.J. Super. 103 (App. Div. 1973), rev'd on other grounds 66 N.J. 401 (1975). See also *United States* v. *Ross,* 243 F.Supp. 496, 499 (S.D. N.Y. 1965), *In re Mengel,* 201 F.Supp. 687, 689 (W.D. Pa. 1962).

It is well settled that an individual can be convicted of contempt for directing abusive or obscene language to the court. *Mayberry* v. *Pennsylvania,* 400 U.S. 455 (1971); *Illinois* v. *Allen,* 397 U.S. 337, 346 (1970); *United States* v. *Bollenbach,* 125 F.2d 458, 460 (2 Cir. 1942); *State* v. *Gonzalez,* 134 N.J. Super. 472, 341 A.2d 673 (App. Div. 1975). The words written across petitioner's parking ticket were directed to the court and were clearly vulgar and abusive. The dignity of the court was certainly thereby impaired.

Petitioner contends that her intent to commit contempt was never established. Intent is an element of the offense of contempt of court. *United States* v. *Seale,* 461 F.2d 345, 368 (7 Cir. 1972); *United States* v. *Meger,* 346 F. Supp. 973, 977 (D.D.C. 1972). This element is established, however, merely by showing that the conduct in question was done willfully. The defendant need not have known that he was violating the law. He must only have intended to do what he did, so that his misconduct did not occur by accident or inadvertence. *Finn* v. *United States,* 219 F.2d 894 (9 Cir. 1955), *cert.* den. 349 U.S. 906 (1955); *Dennis* v. *United States,* 171 F.2d 986 (D.C. Cir. 1949) Supp. 222, 226 (C.D. Cal. 1971). At the contempt hearing the court concluded that petitioner had deliberately invoked the bizarre procedure used to return her summons. This finding was buttressed by the letter sent to the court stating that petitioner would not appear at the hearing. That letter contained an insulting command directed to the presiding judge. It is thus clear that petitioner engaged in a willful act of contempt of court, and her conviction thereof was entirely warranted.

CONCLUSION

For the reasons set forth herein, it is respectfully urged that the petition for Writ of Certiorari should be denied.

Respectfully submitted,

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